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Supreme Court of the United States

OCTOBER TERM, 1999

UNITED STATES OF AMERICA,
Petitioner,

– v. –

ANTONIO J. MORRISON, ET AL.,
Respondents.

CHRISTY BRZONKALA,
Petitioner,

– v. –

ANTONIO J. MORRISON, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF AMICUS CURIAE OF WOMEN'S FREEDOM NETWORK ON BEHALF OF RESPONDENTS

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TABLE OF AUTHORITIES

CASES

Brzonkala v. Virginia Polytechnic Institute and State University, 169 F.3d 820 (4th Cir. 1999) 11, 12

City of Boerne v. Flores, 521 U.S. 507 (1997) 1, 6, 9, 12

Gibbons v. Ogden, 9 Wheat 1 (1824) 10

Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) 1, 7, 8, 25

Katzenbach v. McLung, 379 U.S. 294 (1964) 1, 6, 7, 8

Landgraf v. USI Film Products, 511 U.S. 244 (1994) 25

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 5

New York v. United States, 505 U.S. 144 (1992) 23-24

NLRB v. Jones & Laughlin Steel, 301 U.S. 1 (1937) 10, 22

Preseult v. I.C.C., 494 U.S. 1 (1990) 1, 5, 6, 7, 21, 25

United States v. Darby, 312 U.S. 100 (1941)) 22, 25

United States v. Lopez, 514 U.S. 549 (1995) 1, 11, 22, 23, 25, 26

U.S. v. Wrightwood Dairy Co., 315 U.S. 110 (1942) 10

Wickard v. Filburn, 317 U.S. 111 (1942) 10, 25

UNITED STATES CONSTITUTION

US Const. art. I, § 8 ..... passim

US Const. amend. V 8

US Const. amend. XIV, § 1 ..... 2, 9

US Const. amend. X 11

LEGISLATIVE HISTORY

H.R.Conf.Rep. No. 103-711 (1994) 13

Women and Violence, *Hearings on Legislation to Reduce the Growing Problem of Violent Crime Against Women*, S.Hrg. 101-139, Pt. 1 14

S.Hrg. 103-878 (Nov. 16, 1993) 28

S.Rep. 103-138 (1993) 28

SCHOLARLY STUDIES AND ARTICLES

Jean Abbot, Robin Johnson, Jane Koziol-McLain, and Steven Lowenstein, *Domestic Violence against Women: Incidence and Prevalence in Emergency Room Populations*, 273 Journal of the American Medical Association 1763 (1995) 17-18

John L. Baier, Marianne G. Rosenzweig and Edward G. Whipple, *Patterns of Sexual Behavior, Coercion and Victimization of University Students*, 32 Journal of College Student Development 311 (1991) . 14, 15, 16, 17

Bureau of Justice Statistics, *Sex Differences in Violent Victimization*, at 8 (Sept. 1997), available at http:\\ojp.usdoj.gov/bjs/pub/ascii/sdvv.txt 16

Bureau of Labor Statistics, *Fatal Occupational Injuries By Selected Worker Characteristics and Event or Exposure*, 1994, at 1 16

Census of Fatal Occupational Injuries - 1994, *reprinted in* Bureau of Labor Statistics News (Aug. 3, 1995) 16

Vallerie E. Coleman, *Lesbian Battering*, 9 Violence and Victims 139 (1994) 16

Martin S. Fiebert, *References Examining Assaults by Women on Their Spouses/Partners*, in 1 Sexuality & Culture 273 (1998) 16

Richard J. Gelles, *Domestic Violence Factoids*, available at http:\\www.mincava.umn.edu/papers/factoid.htm 18

Lawrence A. Greenfeld et al., *Violence by Intimates*, in BJS Factbook 11, Mar. 1998 20

Garfield E. Harmon, R. Glynn Owens, and Michael E. Dewey, *Rapists' Versus Non-Rapists' Attitudes Toward Women*, 39 International Journal of Offender Therapy & Comparative Criminology 269 (1995) 14

Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 Harv. L.Rev. 1255 (1994) 15

Carolyn Kozma and Marvin Zuckerman, *An Investigation of Some Hypotheses Concerning Rape and Murder*, 4 Personality and Individual Differences 23 (1983) 14

Patrick Langan and John M. Dawson, Spouse Murder Defendants in Large Urban Counties, BJS Special Report July 1994; *id.*, Sept. 1995 27

S.D. Peters, G.E. Wyatt, and David Finkelhor, *Prevalance*, in Finkelhor et al, *A Sourcebook on Child Sexual Abuse* 15 (1986) 17

Robert A. Prentky, Murray Cohen, and Theoharis Seghorn, *Development of a Rational Taxonomy for the Classification of Rapists*, 13 Bulletin of the American Academy of Psychiatry & the Law 39 (1985) 15

Michael R. Rand, *Violence-Related Injuries Treated in Hospital Emergency Rooms*, in BJS Special Report, Aug. 1997, at 1 17

Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U.L.Rev. 543, 547 (1992) 15, 16

Douglas A. Smith and Jody Klein, *Police Control of Interpersonal Disputes*, 31 Social Problems 468 (1984) 27

Sourcebook of Criminal Justice Statistics 1991, Table 3.19 at 275 17

U.S. Dep't of Health and Human Services, *Public Health Service, Physical Violence and Injuries in Intimate Relationships*, 45 Morbidity and Mortality Weekly Report (1996) 17

U.S. DOJ, Bureau of Justice Statistics, Tracking Offenders 2 (June 1991) 28

OTHER AUTHORITIES

Stephen Donaldson, *The Rape Crisis Behind Bars*, *N.Y. Times*, Dec 29, 1993 at A11 17

Jiordana Hart, *Lawsuit Says Men Face Bias In Courts*, Bost. Globe, Sept. 8, 1999, at B3 3

Jeanie Kasindorf, *Inside the Mind of a Rapist*, Redbook, Jan. 1993, at 77, 93 (interviewing rape researcher Robert Prentky) 15

Randall Kennedy, *The Price to Pay For Racial Equality*, L.A. Times (June 17, 1997) 15

Letter from Peggy Meszaros to Faculty, Staff, and Students of VA Tech, Senior V.P. and Provost of VA Tech, Dec. 5, 1995 4

News Release, Office of the Commonwealth's Attorney for Montgomery County, April 10, 1996 4

New York Times/ CBS News Poll: Complete Results, Oct. 1999, at NYTimes.com 17

Cathy Young, *Who Says Women Don't Lie About Rape*, Salon Magazine, Mar. 10, 1999, http:\\www.Salon.com\news\1999\03\cov_10news.html ... 3

INTEREST OF AMICUS

The Women's Freedom Network is an organization dedicated to promoting equal rights and fairness for both sexes using an individual-rights oriented approach to gender issues.

SUMMARY OF ARGUMENT

The Court should hold that violent criminal acts cannot be presumed to fall within the purview of the Commerce Clause. U.S. Const. art. I, § 8. The Court should decide this constitutional question without deference to Congress's opinions expressed in its findings.

As *Lopez* provided, the Court must make an "independent evaluation of constitutionality." *U.S. v. Lopez*, 514 U.S. 549, 562 (1995). When a constitutional question concerns the scope of the Commerce Clause and not the rationality of a Congressional classification, the Court has an obligation to review it independently. Even the cases cited by Petitioners – *Preseult v. I.C.C.*, 494 U.S. 1 (1990), *Katzenbach v. McClung*, 379 U.S. 294 (1964) and *Heart of Atlanta Motel, Inc. v. U.S.*, 379 U.S. 241 (1964) – clearly demonstrate this point. Indeed, the Petitioners' argument is an attack on two key structures of our system of government: separation of powers and judicial review. *City of Boerne v. Flores*, 521 U.S. 507 (1997), affirmed that the Court must defend itself against such attacks. The Court's responsibility to safeguard the system of federalism, by enforcing Tenth Amendment limitations, provides yet another reason why the Court should make its constitutional decision about the scope of the commerce power without being bound by any opinion of Congress that is merely "rational."

Congress's finding that gender-motivated violence substantially affects interstate commerce is conclusory and is not supported by any evidence whatsoever. The statistics Congress considered, concerning general instances of violence affecting women, such as rape and domestic violence, do not speak to the incidence of gender-motivated violence. Nor do they demonstrate that women are disproportionately affected by crimes of violence. And they certainly do not show any significant effect upon interstate commerce. The Court should therefore hold that the Congress's finding is without a rational basis, and

should not rely upon this finding in making its own decision regarding the scope of the commerce power.

In any case, the Court should hold that the Congress's legislative decision to target gender-motivated violence was irrational. Gender-motivated violence is not the cause of any effects upon interstate commerce found by the Congress to result from violence generally. Therefore, § 13981 (the "provision") is not reasonably crafted to target an activity that is causally related to the effect found. Indeed, it is both underinclusive (in failing to target the activity about which findings were made), and overbroad (in presuming that all types of gender-motivated violence substantially affect interstate commerce).

Furthermore, the Court must hold § 13981 invalid as exceeding the scope of the commerce power. The Court must do so, because gender-motivated violence's relationship to interstate commerce is too remote to be "substantial" as a constitutional matter. That most of the claimed effects stem from the *fear of* gender-motivated violence adds an additional step to an already arduous journey, further showing how remote is the connection to interstate commerce. In any case, Petitioners' two proffered connections (the decrease in national productivity, and the costs of the criminal acts) were squarely rejected in *Lopez* because they did not contain a limiting principle, yet none of the limiting principles suggested by Petitioners provide effective limits.

The Court should also hold that § 13981 exceeds the reach of the commerce power because it targets a non-economic activity. Sweeping dicta in past cases notwithstanding, the Court has never held that the Congress could enact a presumption that the commerce power extended over violent criminal acts, and it should not do so now.

Finally, the Fourteenth Amendment also does not permit Congress's *ultra vires* action. Congress's power under this Amendment is remedial only, and there is no rational basis for Congress to find gender bias attributable to the States because there is no persuasive evidence of such bias.

ARGUMENT

Petitioners ask this Court to hold that all gender-motivated violence is within the reach of the commerce power. The Court's precedents demand that it refuse. Furthermore, the structure of § 13981 raises disturbing questions in its lack of regard for federalism, the separation of powers, and the Court's authority as the ultimate interpreter of the Constitution.

Section 13981 rests not only upon factually incorrect premises but also upon the offensive and false assumption that the nation is in the midst of a gender war. If read to include a presumption that all violent crimes against women are crimes due to gender, then the provision needlessly polarizes women and men, and offensively perpetuates outdated stereotypes portraying men as brutal aggressors and women as passive victims. If read to require a showing of gender animus in each case, then it poses the danger that trials will become repeated referenda on gender-group dynamics, thereby taking away attention from trials' proper focus: the crimes of individual offenders and the suffering of individual victims.

A comparison of § 13981 to the Civil Rights Act of 1964 is equally ill-conceived. To equate Jim Crow regimes with whatever subtle bias or societal trends may affect women today is to trivialize the serious hardships suffered by blacks in the past. Indeed, black and minority men may be disadvantaged by policies that protect women at the risk of injustice to men.[1] In this case, the alleged behavior of Respondents Morrison and Crawford, both young black men, was evaluated by both University judicial committee and a grand jury. The grand jury did not find enough evidence to proceed with the matter,

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[1] *See, e.g.*, Cathy Young, *Who Says Women Don't Lie About Rape*, Salon Magazine, Mar. 10, 1999, http:\\www.Salon.com\news\1999\03\cov_10news.html (The "'women don't lie' dogma has led to serious infringements on the rights of accused men [because] it seems to leave no room for the presumption of innocence when a woman accuses a man of violating her"); *see also* Jiordana Hart, *Lawsuit Says Men Face Bias In Courts*, Bost. Globe, Sept. 8, 1999, at B3 (lawsuit filed by Massachusetts men alleges gender bias by domestic relations courts in, for example, granting restraining orders without sufficient evidence to meet legal standard).

and the University found only that Morrison had used abusive language. *See* News Release, Office of the Commonwealth's Attorney for Montgomery County, April 10, 1996; Letter from Peggy Meszaros Senior V.P. and Provost of VA Tech, to Faculty, Staff, and Students of VA Tech, Dec. 5, 1995. Now Ms. Brzonkala has revived her complaint against Morrison and Crawford yet again, this time using § 13981. This factual scenario – in which a white woman is given the option to renew a twice-rejected complaint against young black men – should give pause to those Petitioners and amici who view the world through lenses of race and gender. The Women's Freedom Network itself believes that it is no more anti-female to recognize that some women wrongly accuse men of rape, than it is anti-male to recognize that some men rape women.

I. The Court Must Decide the Constitutional Questions Without Deference to Congress's Opinions.

A. As *Lopez* articulated, the Court must make an "independent evaluation of constitutionality" in deciding whether an activity substantially affects interstate commerce so as to fall within the reach of the commerce power.

Lopez clearly states that the Court must conduct an "*independent* evaluation of constitutionality under the Commerce Clause." *See Lopez*, 514 U.S. at 562 (emphasis added); *see also id.* at 557 n.2 (whether an activity 'substantially affects' interstate commerce such that it may be regulated under the Commerce Clause "is ultimately a judicial rather than a legislative question") (quoting *Heart of Atlanta*, 379 U.S. at 273 (Black, J., concurring).

This pronouncement of *Lopez*, the Court's most recent and important commerce case, is definitive. Indeed, knowing they cannot win an argument that review is not "independent," Petitioners argue that by performing an "independent" judgment the *Lopez* Court simply "ma[d]e its own judgment as to whether Congress had a rational basis." Brz. Br. at 27, *see also* Gov't at 22. This argument strangely fails to acknowledge the factual context in which the *Lopez* Court made its "independent" decision: Congress had recently amended the statute by appending findings to it. If the Court had truly believed that

the presence of findings changed an independent decision into a rational basis review, it never would have struck the provision because engaging in such proceduralism would have been disrespectful to Congress.

As the next section shows, Petitioners' argument depends upon the use of imprecise statements from cases decided during the most expansive period in the Court's commerce jurisprudence, and confuses the Court's two roles: determining the answers to constitutional questions, and reviewing Congress's answers to legislative questions.

B. Congress's findings on factual or legislative questions do not decide the constitutional questions presented here, nor do past cases suggest otherwise.

In deciding whether § 13981 exceeds the reach of the commerce power, this Court must answer at least one of the following two questions. The first is whether the *activity* regulated – violent criminal acts motivated by gender animus – is within the reach of the commerce power. The second is whether this activity affects interstate commerce *substantially* enough to fall within the commerce power. The Court must decide both questions without any deference to Congress's opinion, whether or not expressed in formal or informal findings, because the Court alone has the "power" to decisively and finally "determine if Congress has exceeded its authority under the Constitution." *City of Boerne v. Flores*, 521 U.S. at 536 (1997); *see Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 172 (1803).

This case also offers the Court the opportunity to review one factual finding of Congress (that there is a burden upon interstate commerce), and one legislative one (that regulation of the activities targeted will alleviate that burden). The Court may perform both of these reviews using the "rational basis" test.

In an argument evincing their fundamental misunderstanding of the Court's authority, Petitioners state, quoting *Preseult*, 494 U.S. at 17, that the presence of congressional findings must shift the Court's analysis of the purely constitutional questions into the same rational basis standard used to review legislative decisions. *See* Gov't at 22, Brz. Br. at 27 (quoting *Preseult*'s statement that "we must defer to a congressional finding that a regulated activity affects interstate

commerce if there is any rational basis for such a finding"). The development of the two different standards, however, is premised on the fact that the Court and the Congress have different areas of competence. *See City of Boerne*, 521 U.S. at 535 (Congress's "sphere of powers and responsibility" differs from Court's). Petitioners' attempt to delegate much of the Court's authority over constitutional questions to the Congress (which has primary legislative authority) should fail for this reason alone.

1. In *Preseult, McClung*, and *Heart of Atlanta*, the Court decided the constitutional questions without deference to Congressional findings; the language Petitioners quote refers only to the Court's deference to Congressional structuring of the statutory scheme.

A close reading of all three cases demonstrates that the Court decided the questions concerning the scope of the commerce power without deference to Congress's findings.

In reviewing whether the Congress could create a recreational trail system along interstate railway rights of way without triggering rights that arose upon abandonment of railway use, the *Preseult* Court did not face either of the constitutional questions raised here, because its power to regulate channels of interstate commerce was already well-established.

The only question at issue in *Preseult* was a legislative one: whether Congress had chosen acceptable means to accomplish a clearly constitutional purpose. Both the findings, and the Court's decision, related solely to the validity of the *means* chosen. Congress's findings were only that the means chosen would effect the law's desired purpose of rail banking, *see Preseult*, 494 U.S. at 8 ("The key finding of this Amendment is that interim use of a railroad right of way for trail use ... shall not constitute an abandonment of such rights-of-way for railway purposes"). The Court's holding also focused upon the rationality of the means, concluding that "we are not at liberty under the rational basis standard of review to hold the [law] invalid merely because more Draconian *measures* ... might advance more

completely the rail banking purpose." *Preseult*, 494 U.S. at 18-19 (emphasis added).[2]

Nor do *McClung* and *Heart of Atlanta* support Petitioners' view. In each case the Court employed rational basis review, in judging Congress's legislative decision that its chosen means were appropriate, only after it had first concluded that the legislative action was permitted by virtue of being within the commerce power.

To begin with *McLung*, the Court there had no need to analyze extensively whether the activity – the discriminatory service of food in interstate restaurants – was reached by the commerce power, because the "Court has held time and again that this [commerce] power extends to activities of retail establishments, including restaurants, which ... burden interstate commerce." *McLung*, 379 U.S. at 302. As to whether the activity's effect upon interstate commerce was substantial enough to make regulation of it constitutionally permissible, the Court performed an independent review of the information considered by Congress before holding that the effect was indeed substantial enough. The Court could not have felt bound to defer to Congress's informal findings, for it neither expressed any such belief nor chastised the district court for ignoring them. *See id.* at 300 (telling district court only that its conclusion"fl[ew] in the face of stubborn fact").

The Court's only remaining task was to review the legislative determination "whether the Act is a reasonable and appropriate means" to solve the burden imposed upon interstate commerce by discrimination in food service. *Id.* at 299. The "means" questioned was, of course, the Congress's choice to prohibit *racial discrimination* in restaurants. The Court concluded that the choice to target this particular activity was an acceptable one: "where the legislators ... have a rational basis for finding a *chosen regulatory scheme* necessary for the protection of commerce, our investigation is at an end." *Id.* at 303-04. The Court then summarized as follows:

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[2] Petitioners in that case also argued that the Congress's true purpose was the creation of the trails rather than the "rail banking." Knowing that this activity also had previously been determined to be within the commerce power, the Court dismissed Petitioners' argument by stating the trails were valid "because they are *reasonably adapted* to the goal."

1) "Congress ... had a rational basis for finding that *racial discrimination* in restaurants" negatively affected interstate commerce, and 2) Congress "prohibited discrimination only in those establishments having a close tie to interstate commerce ... We think that in so doing, Congress acted well within its power." *Id.* at 303-304 (emphasis added). Clearly, the Court applied the rational basis test only to the choice of the targeted activity, and decided the constitutional question on its own.

Petitioners' other case, *Heart of Atlanta*, provides even less support for their argument that the Court should employ the rational basis test no matter whether it is reviewing a legislative decision or answering a constitutional question. In *Heart of Atlanta* also, the Court did not defer to the informal Congressional findings, but instead examined them and then -- reaching its own constitutional conclusion about the substantiality of the effect -- stated that "the voluminous testimony presents overwhelming evidence that discrimination by hotels and restaurants impedes interstate travel." *Heart of Atlanta*, 379 U.S. at 241. The Court then easily disposed of the other constitutional question (whether the activity was one that could be regulated), concluding that the regulation of *hotels* was well within the Congress's power to safeguard "channels of interstate commerce" and "local incidents thereof". *See id.* at 256, 258.[3]

Only after it turned to address the Fifth Amendment challenge did the Court review Congress's legislative determination regarding the scope and structure of the Act, and it was in this context *only* that the Court framed the questions as "(1) whether Congress had a rational basis for finding that racial discrimination by motels affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate." *Id.* at 258.

All the commerce cases can be parsed in this manner. Such an exercise leads to an inescapable conclusion: the Court employs rational basis review only when reviewing the classifications and

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[3] The Court also found it important that the Civil Rights Act of 1964, unlike the Civil Rights Act of 1875, included a requirement that affected hotels and restaurants have a relationship to interstate commerce. *See Heart of Atlanta*, 379 U.S. at 250. Of course, § 13981 includes no such requirement.

choices Congress makes in structuring laws, and not when deciding whether a law is empowered by an enumerated power.

2. Concern for the separation of powers and the system of judicial review also compels the conclusion that the Court cannot defer to Congress in deciding constitutional questions relating to the scope of federal power.

No doubt is cast upon this conclusion by the Court's review of State laws affecting commerce under a rational basis standard. Because state power is plenary, the Court in reviewing state actions is never concerned with whether a targeted activity falls within the scope of state power. Rather, the Court reviews state laws only for their compliance with constitutional guarantees such as the right to "equal protection of the laws." U.S. Const. amend. XIV. In such reviews, the Court merely examines the classifications made by the States in executing power that is clearly within their scope, and therefore properly uses the rational basis test.

Similarly, although the Court uses the "rational basis text" to review most Congressional actions under the Fifth Amendment's guarantee of equal protection, this is because that clause speaks only to the manner in which the federal government may act, and does not purport to define the scope of such action.

In contrast, although Congress's power to regulate "commerce ... among the several States" is plenary, it is nonetheless bounded, because it is an enumerated power. The plenary power over *means* is available, therefore, only once the Court has determined independently that the targeted activity is within the scope of the commerce power.

The Court refused in *City of Boerne* to let Congress define the scope of its powers under the Fourteenth Amendment, because "[i]f Congress could define its own powers ... no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means'.... Under this approach, it is difficult to conceive of a principle that would limit congressional power." *City of Boerne*, 521 U.S. at 529. The same principle applies here. The Court should refuse to let Congress define the scope of its powers under the Commerce Clause:

the Court must address the two constitutional questions without deference to the Congress.

C. The Court's responsibility to enforce other constitutional limitations confirms that it must independently answer questions about the scope of constitutional power.

The "independent" review applied in *Lopez* is vitally necessary to safeguard the system of federalism against an expansionist national government. Of course, the Court has stated consistently from the outset that the power of Congress over interstate commerce "acknowledges" the "limitations ... prescribed by the constitution." *Gibbons v. Ogden*, 9 Wheat 1, 196 (1824); *see also Wickard v. Filburn*, 317 U.S. 111, 124 (1942) ("The power of Congress over commerce ... acknowledges no limitations other than are prescribed in the Constitution") (quoting *U.S. v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942) (quoting *Gibbons*); *NLRB v. Jones & Laughlin Steel*, 301 U.S. 1, 57 (1937) (scope of the commerce power "must be considered in the light of our dual system of government").

It is becoming ever clearer, however, that these limitations are real, and that in exercising any power granted it by the constitution, the federal government must still observe other constitutional limitations. In particular, actions justified under the Commerce Clause often implicate "the proper division of authority between the Federal Government and the States." *New York v. U.S.*, 505 U.S. 144, 144 (1992). Whenever the Court must identify the outer limits of the commerce power, therefore, it must also keep federalism concerns in mind. As Justice O'Connor, writing for the Court in *New York v. U.S.*, explained:

> "In some cases the Court has inquired whether an Act of Congress is authorized by one of the powers delegated to Congress ... [i]n other cases the Court has sought to determine whether an Act of Congress invades the province of State sovereignty ... [T]he two inquiries are mirror images of each other. ... In the end, it makes no difference whether one views the question at issue in these cases as one of ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment. Either way, *we* must determine whether any of [the challenged provisions] overstep the boundary between federal and state authority."

Id., 505 U.S. at 155, 159 (emphasis added).

The Court must certainly consider federalism in this case, for two reasons. First, the challenged provision affects an area of the law "to which the States lay claim by right of history and expertise." *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring); *see also Brzonkala v. Virginia Polytechnic Institute and State University*, 169 F.3d 820, 840-842 (4th Cir. 1999) (describing multiple ways in which the challenged statute alters the balance between federal and state power). Second, the provision attempts an "extension" of the commerce power beyond that which is well established. *See Lopez*, 514 U.S. at 580 (Kennedy, J., concurring) (when "Congress attempts [an] extension [beyond the commerce power upheld in "earlier cases to come before the Court"], then at the least we must inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern").

Whenever the federal-state line is implicated by a statute, a court considering the statute must perform its constitutionally-allocated responsibility to say where the line is. As Justice Kennedy explained in *Lopez*:

> Although one conclusion that *could be* drawn from the Federalist Papers is that the balance between national and state power is entrusted in its entirety to the political process, ... the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far.

Lopez, 514 U.S. at 575 (Kennedy, J., concurring).

Just as clearly, the Court's consideration of Tenth Amendment limitations upon the commerce power must be "independent," i.e., not

bound even by rational congressional opinions on the question.[4] Any more deferential standard of review would be "nothing short of putting the fox in charge of the chicken coop," as the Fourth Circuit put it, *Brzonkala*, 169 F.3d at 861, because the chief threat to state sovereignty is the Congress itself. Furthermore, use of a "rational basis" standard would be an improper abdication of the Court's responsibility, because in the "difficult" and delicate federalism inquiry, both sides will undoubtedly have strong and reasonable arguments to draw upon. *See Lopez*, 514 U.S. at 565-66 (although dissent argues that "Congress could just as easily look at child rearing as 'fall[ing] on the commercial side of the line,'" Congress's broad authority "does not include the authority to regulate each and every aspect of local schools"). The Court here can fulfill its role only by deciding *for itself* whether a statute "upsets the federal balance to a degree that renders it an unconstitutional assertion of the commerce power." *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring).

D. The Court must also independently decide whether the Fourteenth Amendment remedy is "congruent" and "proportionate".

In deciding whether a remedy chosen by Congress falls within the power granted it by the Fourteenth Amendment (*i.e.*, in applying the test whether the remedy is congruent and proportional), the Court must conduct an independent review. *See City of Boerne v. Flores*, 521 U.S. 507.

II. Congress's Findings Fail a Rational Basis Test, and Therefore Cannot Support the Constitutional Conclusions of Either the Congress or the Court.

A. In making its independent constitutional decision about the scope of the commerce power, the Court should not rely upon Congressional factual findings that are both inaccurate and irrelevant.

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[4] The Court's obligation to make an independent review is made easier by its ability to rely upon precedent, of course, so it need not expend judicial resources continuously re-weighing a settled aspect of the balance.

The evidence Congress considered does not support its factual conclusions, and other evidence readily available to Congress flatly contradicts these factual conclusions. The findings have no rational basis, and therefore any legislative or constitutional conclusion based upon them must be seriously in doubt. Certainly the Court should not mirror Congress's missteps by incorporating seriously flawed factual findings and illogical arguments into the Court's own independent determination of the provision's constitutionality.

Whether or not formal factual findings exist or are used by the Court, the Court's obligation to conduct its constitutional analysis independently allows it to consider arguments and evidence not considered by Congress. If this were not so, then whenever the Congress did not make findings the Court would have no facts upon which to base its decision. The Women's Freedom Network has therefore provided additional evidence disproving the unsupported assertions cited by Congress and Petitioners.

B. Congress's finding that gender-motivated violence is a significant problem is irrational.

1. Congress considered no evidence concerning the prevalence of gender-motivated violence.

Petitioners are unable to point to any factual evidence in the record that supports the theory that gender motivated violence is a significant problem, apart from their repeated citations to the conclusory statements in the House and Senate reports that "crimes of violence motivated by gender have a substantial adverse effect on interstate commerce." Brz. Br. at 8 (quoting H.R. Conf. Rep. No. 103-711, at 385 (1994)), 10 (repeating first cite, and adding virtually identical conclusory quotation from Senate Report), 28 (paraphrasing quotations quoted on pages 8 and 10), 29 (referencing page 10, which includes both quotations); 37 (referencing congressional findings on earlier pages, but not providing any supporting facts); Gov't at 5, 17, 23.

Had there been such evidence presented, Petitioners would have cited it. Their failure to do so allows the Court to conclude that no such evidence is in the record.

2. Evidence about the incidence of violence against women generally, or about the incidence of rape and domestic violence, is not relevant to a determination of the incidence of gender-motivated violence.

Petitioners do cite evidence considered by Congress about the regrettable occurrence of violent acts committed against women, with particular emphasis upon evidence of rape and domestic violence. But they fail to cite factual evidence showing that such acts constitute *gender-motivated* violence.

At the hearings, certain amici did explain their viewpoint that virtually all violence against women is ipso facto gender motivated. *See, e.g.*, Women and Violence, *Hearings on Legislation to Reduce the Growing Problem of Violent Crime Against Women*, S.Hrg. 101-139, Pt. 1, at 36 ("we are trying to ... make it a policy of this country that rapes are hate crimes committed against women") (Statement of Senator Biden); at 63 ("[W]omen and girls who become victims of rape, domestic violence, and many other crimes are being attacked and killed because of their sex") (Statement of Helen Neuborne, then-director of NOW Legal Defense Fund). But Petitioners and their amici cannot now point to any factual evidence to support this political opinion, so this attempt to bootstrap evidence out of their own previously expressed opinions must fail.

In fact, however, and contrary to Petitioners' contentions, studies show that most violence is *not* due to gender animus against women.

For example, there is no evidence suggesting that rapists have greater hostility toward women than toward men. *See, e.g.*, Garfield E. Harmon, R. Glynn Owens, and Michael E. Dewey, *Rapists' Versus Non-Rapists' Attitudes Toward Women*, 39 International Journal of Offender Therapy & Comparative Criminology 269 (1995); *see also* Carolyn Kozma and Marvin Zuckerman, *An Investigation of Some Hypotheses Concerning Rape and Murder*, 4 Personality and Individual Differences 23 (1983).

Indeed, male homosexuals frequently experience date rape. *See* John L. Baier, Marianne G. Rosenzweig and Edward G. Whipple, *Patterns of Sexual Behavior, Coercion and Victimization of*

University Students, 32 Journal of College Student Development 311, 316 (1991).

Evidence also disproves the contention that female battering victims are targeted *because of* their gender. *See, e.g.*, Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U.L.Rev. 543, 547 (1992) (acknowledging that elder abuse and battering in same-sex couples subverts the "battering as sexism" model).

Rather than being motivated by gender, most offenders who direct violence at women do so for a variety of other reasons. For example, a robber who attacks a woman is likely doing so because she poses less of a threat to his own safety rather than because he has animus against women as a group. *Cf.* Randall Kennedy, *The Price to Pay for Racial Equality*, L.A. Times (June 17, 1997) (explaining that black taxi drivers who refuse pickups in dangerous areas do so "not because they are bigots but because they perceive that doing so will maximize their self-interest" in physical security); *see generally* Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 Harv. L.Rev. 1255 (1994) (explaining that crimes especially affecting blacks, and state failure to protect blacks against them, are not due to racial *bias*, but are the result of neutral factors with disproportionate effects).

Similarly, most male rapists who choose female victims do so because *the rapists themselves are heterosexual* rather then because they are biased towards women as a group. Homosexual male rapists usually choose male victims for the same reasons. *See also* Baier, *Patterns of Sexual Behavior*, *supra*, at 311 (homosexual men and women engage in sexually coercive behavior on dates).

In fact, misogynistic rapists, who intentionally target women because of their gender, are only a small minority of all rapists. *See* Jeanie Kasindorf, *Inside the Mind of a Rapist*, Redbook, Jan. 1993, at 77, 93 (interviewing rape researcher Robert Prentky); *see also* Robert A. Prentky, Murray Cohen, and Theoharis Seghorn, *Development of a Rational Taxonomy for the Classification of Rapists*, 13 Bulletin of the American Academy of Psychiatry & the Law 39 (1985).

Battering as a phenomenon is now understood to be caused by power struggles in a relationship, not by gender animus. *See, e.g.*, Baier, *Patterns of Sexual Behavior*, *supra* (male homosexual couples engage in battering); Vallerie E. Coleman, *Lesbian Battering*, 9 Violence and Victims 139 (1994) (lesbian couples engage in battering); *see also* Schneider, Challenges of Feminist Theory and Practice, 67 N.Y.U. L. Rev. at 543 (pathological dynamics present in males who batter their female partners are also present in caretakers who batter their elderly care recipients).

3. Even assuming that statistics about rape and domestic violence are relevant, they do not show that women experience such violence at a higher rate than men.

Women suffer from workplace crime at a much lower rate than men. Indeed, they constituted only 17% of workplace homicide victims in 1995. *See Census of Fatal Occupational Injuries* - 1994, *reprinted in* Bureau of Labor Statistics News (Aug. 3, 1995). Petitioners' repeated assertion that "homicide is the leading cause of death for women at work", Brz. Br. at 11; *see* Gov't at 7, merely reflects that womens' jobs generally do not pose the same risk of accidental injury as mens' jobs. In fact, 92% of workplace fatalities are male. *See* Bureau of Labor Statistics, *Fatal Occupational Injuries By Selected Worker Characteristics and Event or Exposure*, 1994, at 1.

Women are also less likely than men to be victimized while travelling. *See* BJS, *Sex Differences in Violent Victimization*, at 8 (Sept. 1997), available at http:\\ojp.usdoj.gov/bjs/pub/ascii/ sdvv.txt.

Furthermore, Congress's finding that "95% of all domestic violence victims are women," *see* Gov't at 6, is completely without foundation. Overwhelming evidence demonstrates that men are victimized by domestic violence at least as often as, if not more than, women. *See* Martin S. Fiebert, *References Examining Assaults by Women on Their Spouses/Partners*, in 1 Sexuality & Culture 273 (1998) ("85 scholarly investigations (70 empirical studies, and 15 reviews and/or analyses) ... demonstrate that women are as physically

aggressive, or more aggressive, than men in their relationships with their spouses or male partners").

Rape and sexual abuse also are not aimed exclusively at women. Indeed, the total number of male rape victims per year probably exceeds the number of female rape victims, once prison rapes are added to statistics. *See, e.g.*, Stephen Donaldson, *The Rape Crisis Behind Bars*, N.Y. Times, Dec 29, 1993 at A11. Furthermore, at least one-third of child sexual abuse victims are male. *See* S.D. Peters, G.E. Wyatt, and David Finkelhor, *Prevalance*, in Finkelhor et al, *A Sourcebook on Child Sexual Abuse* 15 (1986).

Male homosexuals may be at greater risk of date rape than are women. *See* Baier, *Patterns of Sexual Behavior, supra* at 316 (homosexual students – of whom 75% were male – reported a 50% higher incidence of date rape than did heterosexual female students).

And men suffer more injuries than women do from violent assaults. *See* Michael R. Rand, *Violence-Related Injuries Treated in Hospital Emergency Rooms*, in BJS Special Report, Aug. 1997, at 1 (men constitute about 60% of emergency room visitors seeking treatment for injury due to violence).

Indeed, women suffer from all types of crime (including rape) at a lower rate than men. *See* Sourcebook of Criminal Justice Statistics 1991, Table 3.19 at 275 (75% of homicide victims are male; two-thirds of robbery and assault victims are male; men are two and one-half times more likely to be victims of violent assault). Thus, while it may be true that significant numbers of American women will one day become crime victims, *see* Gov't at 6, men are much more likely to be victimized.

Finally, domestic violence is only a very small subset of all violence. Only slightly over 1% of female emergency room visitors are seeking treatment for an injury due to domestic violence. *See* Rand, *Violence-Related Injuries Treated in Hospital Emergency Rooms*, *supra*, at 5 (about 1.2%); U.S. Dep't of Health and Human Services, *Public Health Service, Physical Violence and Injuries in Intimate Relationships*, 45 Morbidity and Mortality Weekly Report (1996) (only 1% of New York female emergency room visitors were seeking treatment for injuries inflicted by domestic violence); Jean Abbot,

Robin Johnson, Jane Koziol-McLain, and Steven Lowenstein, *Domestic Violence against Women: Incidence and Prevalence in Emergency Room Populations*, 273 Journal of the American Medical Association 1763 (1995) (study of five emergency departments found that under two percent of female visitors were seeking treatment for injuries inflicted by domestic violence).

The Government's contention that "20 percent of hospital emergency cases are related to wife battering," *see* Gov't at 26, misreads the underlying survey, which found that this percentage of female emergency room visitors had at some prior point experienced some level of violence from a partner (including mere pushing and grabbing).

These surveys also show that as many or more male emergency room visitors have experienced domestic violence, belying the disproportionality rationale. *Id.* It should be noted that such surveys overrepresent the incidence of domestic violence, because they capture a large percentage of those suffering from injuries related to domestic-violence, but only a small percentage of the total population (specifically, that percentage that has recently experienced injury).

There is also no factual evidence to support Petitioners's contention that "as many as 50 percent of homeless women and children are fleeing domestic violence." Brz. Br. at 12, Gov't at 7 n.4. As a leading authority on domestic violence has stated, this "factoid ... [is] without any actual published scientific research to support it." Richard J. Gelles, *Domestic Violence Factoids*, available at http:\\www.mincava.umn.edu/papers/factoid.htm.

C. In sum, there is no evidence at all to support Congress's conclusory factual finding that gender-motivated violence is a significant problem. The Court owes this finding no deference, therefore, and certainly should not rely upon it in performing its own constitutional analysis.

III. Congress's Legislative Decision – That Any Indirect Causal Effects of Gender-Motivated Violence Upon Interstate Commerce Justify Legislation Targeting Gender-Motivated Violence – Fails a Rational Basis Test, Does Not Support its Own Constitutional Conclusions, and Should Not Be Relied upon by this Court in its Independent Constitutional Analysis.

Although deferential, the rational basis standard is not a nullity. There is no reasonable way that Congress could find that gender-motivated violence, or rape and domestic violence, or even all violence against women, substantially affect interstate commerce – and indeed they do not, at least in any way significant for Commerce Clause purposes. Congress's choice of a statutory scheme that targets gender-motivated violence, as a means of addressing whatever effects there are, is not only too overbroad and at the same time too underinclusive to be rational, but also exceeds its power under the Commerce Clause.

Even if the provision is read to reach all violence against women except that specifically qualifying as "random", it still cannot stand. A presumption that all violence against women is gender motivated either may discriminate against men by failing to presume that violence against men is also gender motivated, or remains overbroad by being applicable to virtually all male violence victims despite the lack of congressional concern about this group. An additional problem with the latter reading is that it belies the contention that the provision is intended to address the civil rights of a discrete group and would, even more than the other options, permit the federal government to intrude unduly into State domains.

A. Congress's choice to target gender-motivated violence, as a way of redressing whatever distortion of interstate commerce exists from violence against women, is irrational because gender-motivated violence is not the proximate cause of the effects found; rather, any such effects are caused by violence against women generally, or by the fear of such violence.

Almost none of the claimed relationships to interstate commerce are close enough to meet *Lopez*'s substantial relationship test. First, the arguments detailed by Petitioners all contain at least one extra step

before they reach interstate commerce. The claimed effect is not caused by the gender-motivated violence itself but by the *fear of* gender-motivated violence, the *fear of injury from* gender-motivated violence, or the *embarrassment at revealing the injury caused by* gender-motivated violence. All these phenomena may exist at least to some degree, but they make the effect of gender-motivated violence qualitatively more remote from interstate commerce.

Furthermore, evidence concerning causation is nonexistent or does not demonstrate a rational connection to interstate commerce. For example, citing evidence in the record that 50% of women avoid using public transportation because of their fear of rape, Brzonkala suggests that gender-motivated violence interferes with women's ability to travel. *See* Brz. Br. at 11. Yet a survey of teenage women showed that only 9% were concerned about being raped. *See* New York Times/ CBS News Poll: Complete Results, Oct. 1999, at NYTimes.com. Furthermore, women travelling locally[5] are most likely to be affected by crimes by strangers, rather than by gender-motivated violence. As explained above, very little rape is gender motivated. And three-fourths of reported incidents of domestic violence occur in the home. *See* Lawrence A. Greenfeld et al., *Violence by Intimates*, in BJS Factbook 11, Mar. 1998.

Similarly, even if women do refuse certain jobs because of the fear of attack, there is no evidence that they fear *gender-motivated* attacks while at work. Indeed, insofar as the attacks feared are more common at night, as Petitioners suggest, *see* Brz. Br. at 11, Gov't at 7, it is likely that they are related to the nature of the industry rather than the gender of the employee. Certainly the evidence, cited by Brzonkala, *see* Brz. Br. at 12, that some men harass their domestic partners while they work because they would prefer them not to work, belies the conclusion that gender-motivated violence affects work patterns. Even if this type of harassment or violence at work were gender motivated, changing or quitting their jobs would not alter

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[5] To the extent they are travelling interstate, the channels justification for regulation of commerce may apply, but § 13981 is vastly overbroad if gender-motivated violence in channels of interstate commerce is its only justification. See below.

affected womens' risk from or fear of this type of violence, because their domestic partners could just as easily follow them to their new jobs or other daytime locations. We also note, however, that the mere desire that a partner not work does not reflect gender animus, even if that desire is inappropriately expressed through violence.

To take another example, womens' reluctance to reveal their status as domestic violence victims (the embarrassment rationale) by going to work with visible injuries cannot show that gender-motivated violence causes an affect on interstate commerce. Whatever consequences such reluctance has on victims' ability to get and keep jobs is due to an intervening psychological state, and is simply too remote. Similarly, even if some college students drop out of school after a rape, such action is not *caused by* the rape but is due to other considerations such as the victim's reluctance to risk encountering the attacker or, perhaps, her "loss of concentration." Brz. Br. at 13. Brzonkala herself waited eleven months before deciding to withdraw - making any connection remote, to say the least. While we sympathize with the difficulties these women face, therefore, we vigorously dispute the implication that women are so much more delicate than men that a law can be premised upon their embarrassment.

That gender-motivated violence causes significant health care and other costs to the economy is also in doubt. Brzonkala's assertion that injuries resulting from violent crime cause such costs, *see* Brz. Br. at 12, does not provide evidence about the costs from gender-motivated violence.

B. Congress's choice to target gender-motivated violence is both underinclusive and overbroad, and therefore fails a rational basis test.

In structuring § 13981, the Government fails to reach the activity about which it is concerned, yet exceeds the reach permitted by any possible commerce justification. A provision's design is irrational if "the means selected by Congress are [not] reasonably adapted to the end permitted by the Constitution." *Preseult*, 494 U.S. at 17 (internal quotes omitted).

The provision is remarkably underinclusive. In targeting only gender-motivated violence, even though virtually no evidence was

presented about the effect of that particular kind of violence, it fails to reach the rape and domestic violence with which Congress seemed to be concerned. This almost total failure to address the subject of concern goes beyond Congress's general freedom to make policy choice, and rises to the level of irrationality.

In addition, the provision is vastly overbroad. The only possible effect upon interstate commerce that is not "remote" is the postulated relationship between gender-motivated violence and interstate travel. Such a relationship, insofar as gender-motivated violence ever occurs in the course of interstate travel, is likely reachable by Congress under its power to regulate "channels" of interstate commerce. But if an effect upon interstate travel is the only justification for its existence, § 13981 is so much too broad as to be irrational.

In light of these flaws, taken in conjunction with § 13981's detrimental effect upon state sovereignty, its noneconomic character, and the danger it poses by using a private cause of action as a remedy, the Court should hold that the design of the provision fails the rational basis test.

IV. In Any Case, As a Constitutional Matter After *Lopez*, Gender-Motivated Violence Cannot be Reached by the Commerce Power.

A. The tenuous relationship between gender-motivated violence and interstate commerce is not "substantial" as a constitutional matter, and Petitioners' suggested limits do not work.

Under the tests articulated in *Lopez*, gender-motivated violence is not within the commerce power because any effects it has upon interstate commerce are "so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely nationalized government." *Lopez*, 514 U.S. at 557. The number of steps Petitioners need in order to connect gender-motivated violence, or even rape and domestic violence, to interstate commerce is simply too great (particularly in the case of the embarrassment rationale).

Petitioners propose only two connections to interstate commerce: the decrease in national productivity, and the costs of crime. *See* Brz. Br. at 23-29; Gov't at 23-27. Both these rationales were unambiguously rejected in *Lopez* because they did not provide a limiting principle bounding the federal sphere. *See Lopez*, 514 U.S. at 564 (noting that lack of limitation would permit the federal government to intrude on "areas where States historically have been sovereign").

1. Petitioners' limiting principles do not provide effective limits.

Attempting to avoid the inevitable conclusion that their suggested connections are as invalid here as in *Lopez*, Petitioners seek to distinguish § 13981 by suggesting several limiting principles: the government's restraint in crafting the provision to exempt certain matters from its reach and to provide dual power to state and federal courts to adjudicate the private causes of action, *see* Brz. Br. at 32-35, Gov't at 34, the inability of the States to solve the problem, *see* Brz. Br. at 29-31, Gov't at 35, and the "civil rights" motivation for enacting the statute as a whole, *see* Brz. Br. at 23-26, Gov't at 34-35. None of these principles survive a closer look.

The Government's restraint, in drafting the provision less broadly than it might have done, is irrelevant. Such exercise of self-restraint may show that Congress considered constitutional limits while crafting § 13981 (and may have some use in the question whether Congress believed *rejected* characteristics were within the powers of the federal government), but it does not show that Congress would necessarily restrain itself in the next instance.

State inability to solve a problem does not move the outer boundary of the commerce power past the barriers placed by the Tenth Amendment. Nor are State requests that the federal government intervene at all relevant. The Tenth Amendment's concern for the States is not intended to benefit the States themselves by causing the federal government to do as they would like; it is intended rather to preserve the individual liberty guaranteed under the federal system. *See New York v. U.S.*, 505 U.S. at 181 ("The Constitution does not protect the sovereignty of the States for the benefit of the States .... To the

contrary, the Constitution divides authority between federal and state governments for the benefit of individuals"). Indeed, there are many problems that the States have failed to solve that would be inappropriate for the federal government to take on (except through its Spending power): other types of crime, unwed motherhood, and truancy, for example.

The "civil rights" motivation also does not provide any realistic limit upon the scope of the commerce power. In the first place, nearly everyone is a member of some sort of protected group (e.g., women, minorities, the elderly, the disabled, etc.) that undoubtedly differs from society at large in important ways. If the Commerce Clause permits Congress to legislate in order to remedy "bias" against any of these group, and bias is found in the disproportionate effects of events (such as crime) affecting society at large, then there is no limit at all. Furthermore, apart from asking whether Congress has the intent to redress a harmful effect upon interstate commerce, the Court does not inquire into the motivation underlying this intent, and wisely so. Such an inquiry would enmesh the Court in a tangle of irrelevant and conflicting motivations (e.g., desire for re-election, quid-pro-quos, pressure from donors or interest groups, desire to appear responsive to public concerns even though the Congress suspects a law may be unconstitutional, etc.) and would be disrespectful to the Congress.

Absent an effective limiting principle, the connection between gender-motivated violence and effects upon interstate commerce is far too tenuous to support jurisdiction over it based on the commerce power.

B. Congress's choice to target gender-motivated violence exceeds the reach of the commerce power because gender-motivated violence is not an economic activity.

1. Gender-motivated violence, as a non-economic activity, cannot be reached by the commerce power.

At its heart, this case presents the constitutional question whether violent criminal acts can be presumed to affect interstate "commerce"

within the meaning of the Commerce Clause. The Court should hold that they cannot.[6]

While the Court has refrained from giving a specific and positive definition of commerce, it has never held that non-economic activity falls with the Commerce Clause's purview.

Petitioners build their argument upon sweeping language in cases such as *United States v. Darby*, 312 U.S. 100 (1942) (the commerce power may extend to "those activities intrastate which [substantially] affect commerce or the exercise of the power of Congress over it", 312 U.S. at 119-120 (1941)) and *NLRB v. Jones & Laughlin Steel Corp.* ("intrastate activities, by reason of close and intimate relation to interstate commerce, may fall within federal control", 301 U.S. 1, 37 (1937)).

But Petitioners' argument has no foundation. It is an axiom of interpretation that expansive language in a case does not bind future Courts further than the facts in the case would allow. *See Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994) ("general expressions ... are to be taken in connection with the case in which those expressions are used"). And both *Darby* and *Jones & Laughlin* involved the economic activity of "industrial labor relations". *Jones & Laughlin*, 301 U.S. at 41; *see also id.* at 95 (McReynolds, J., dissenting) (objecting that majority's rationale would produce worst case scenario in which the commerce power would be found to extend to "all productive enterprises").

Every other prior commerce case – except *Lopez* – has also concerned Congress's power to regulate some aspect of productive enterprise, including *Heart of Atlanta* (sale of lodging), *McClung* (sale of food services), and *Wickard* (production of wheat that would "overhang[] the market" and thereby affect prices, 317 U.S. at 128).

The specific regulations in past cases targeted the manner or quantity of production or sale, and all the individuals or institutions

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[6] The question relates only to Congress's ability to enact a presumption. When a statute contains a jurisdictional element, the question whether a particular action may constitutionally be regulated under the commerce power will be answered by the trial court. That is not this case.

regulated were affected in their economic capacities (in the cited cases, as sellers and producers) at a time when they were in the very act of participating in the stream of interstate commerce (at the point of sale or production, in this instance). Neither § 922(q) nor § 13981 follows this pattern.

Indeed, the first point made by the *Lopez* Court, when it began its review of the provision at issue (after its review of past cases), was that section 922(q) "by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly defined." *Lopez*, 514 U.S. at 561.

Petitioners make no argument that can successfully distinguish gender-motivated violence from gun possession near a school, and indeed there is no argument they could make. Gender-motivated violence does not affect offenders or victims in any economic capacity as producers, distributors, sellers or the like, nor does it affect them at a time when they are participating in the interstate stream of commerce. Making an argument whose lack of quality reveals her desperation, Brzonkala argues that the purchase and subsequent use of educational services is an economic transaction with which the alleged rape interfered. *See* Brz. Br. at 41-42. But her cited case does not support the proposition that enjoyment of educational services, once purchased, is also an economic activity. Furthermore, as explained above, any interference with Brzonkala's education was the result of her decision eleven months later to withdraw, and was not cause by the alleged rape.

The Government does not stoop to this level. But insofar as the Government implicitly argues that the provision's place as one part of a larger statute can save it, *see* Gov't at 36 (arguing that VAWA as a whole is a "prototypical example of cooperative federalism"), it is incorrect. Section 13981's status as part of a larger scheme cannot save it from unconstitutionality, both because the VAWA as a whole is not a "regulation of economic activity" and because the provision is not an "essential" part of the statute. *See Lopez*, 514 U.S. at 561. (Even if the provision is "one of the most important components of the Act," *see* Gov't at 3, such importance does not demonstrate that it is "essential").

The Government also argues that invalidating § 13981 may create the potential that certain future problems may be unsolvable by any level of Government. *See* Gov't at 35. Insofar as the Government fears future inability to address a problem, its fear is unwarranted. States, of course, have plenary power to pass legislation concerning all problems outside the reach of the federal commerce power. Congress may also always act through the Spending power. Insofar as the Government fears it will be unable to *solve* such future problems, its astounding hubris does not require counterargument.

The simple and inescapable conclusion that § 13981 targets noneconomic activity, therefore, shows that it exceeds the reach of the commerce power, and the Court should so hold. In so doing, the Court will not be limiting its ability to decide future cases. It is not necessary to say where the line is in order to say that this provision falls well on its noneconomic side.

V. Section 13981 also cannot find justification in the Fourteenth Amendment, and so must be found unconstitutional.

A. The finding that there is gender bias in state justice systems is not supported by the evidence.

Although others will no doubt cover this topic in depth, we present a few examples to debunk the myth of State court bias.

First, even if States treat domestic violence less seriously than murders or robberies, the same treatment is given to other violent crime between acquaintances. Arrest rates for domestic and non-domestic disputes do not differ once levels of injury are taken into account. *See, e.g.*, Douglas A. Smith and Jody Klein, *Police Control of Interpersonal Disputes*, 31 Social Problems 468 (1984).

Second, States convict male murderers at equal rates, regardless whether the victim was the offender's spouse or was a (generally male) non-family member. *See* Patrick Langan and John M. Dawson, Spouse Murder Defendants in Large Urban Counties, BJS Special Report July 1994; *id.*, Sept. 1995 (two-year study of the 75 largest urban counties, accounting for more than half of total murders in U.S.).

Indeed, women receive far gentler treatment from the courts than men do. Women who committed unprovoked murders of their husbands received an average sentence of only seven years, whereas men who committed unprovoked murders of their wives received an average sentence of seventeen years. *See id.* at 3.

Brzonkala's comparisons of prosecution and conviction rates between murder cases and rape cases are not appropriate. *See* Brz. Br. at 16. In murder cases, it is generally clear that a crime has been committed, because a person is dead; furthermore, the law does not recognize consent to murder. Rape prosecutions, on the other hand, often must prove both the question of consent and the question whether a crime has been committed (unless there is physical evidence of injury), and the factfinder often must decide between two conflicting versions of the event, neither of which is supported by other evidence.

The proper comparison, therefore, is between treatment of rape cases and treatment of felony assault cases, because these also often involve acquaintances who each tell uncorroborated and conflicting stories. And prosecution and conviction rates for rape and for violent assault are almost identical. *See* U.S. DOJ, Bureau of Justice Statistics, Tracking Offenders 2 (June 1991) (eight-state study showed that 80 percent of those arrested for sexual assault were prosecuted, compared with 77 percent of those arrested for felony assault; 54 percent of those prosecuted for sexual assault were convicted, but only 46 percent of those prosecuted for felony assault were convicted).

Finally, many of the evidentiary rules against which Petitioners complain are designed to ensure fairness to defendants, who are entitled to the presumption of innocence. Eliminating such rules – for example, by failing to question an inconsistent story – would risk grave injustice to men. *See, e.g.*, S.Rep. 103-138 (Sept. 10, 1993) (suggesting there is anti-female bias in fact that court personnel "question the credibility of rape victims based on ... matters that are irrelevant ... For example, they may require a woman ... to tell a consistent story"); S.Hrg. 103-878 (Nov. 16, 1993) (quoting Senator Cohen's assessment that gender bias was revealed in case where jury failed to find that wife's cutting off husband's private parts was conclusive proof that husband had committed rape).

B. Because there is insufficient evidence of bias, there is no need for the Congress to act. In any case, the remedy chosen was neither congruent nor proportional. The Court should therefore hold that it exceeded Congress's authority under the Fourteenth Amendment.

CONCLUSION

The judgment of the *en banc* United States Court of Appeals for the Fourth Circuit should therefore be affirmed.

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